

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Innovation in the Broadcast Television Bands:)	ET Docket No. 10-235
Allocations, Channel Sharing and)	
Improvements to VHF)	

COMMENTS

The Office of Communication of the United Church of Christ, Inc., Media Alliance, National Organization for Women, the Benton Foundation, and Campaign Legal Center (collectively, “*UCC et al.*”), by their counsel, the Institute for Public Representation, respectfully submit these comments in response to the notice of proposed rulemaking seeking comment on repurposing and innovation in the broadcast television bands.¹

To address the growing demand for wireless broadband services, the Commission is proposing to “repurpose” 120 megahertz of broadcast spectrum by allowing broadcast television licensees to voluntarily give up their licenses and/or to share a six-megahertz frequency channel with other television broadcasters.² *UCC et al.* support the Commission’s goals of expanding wireless broadband services and promoting efficient and innovative uses of the public spectrum. However, *UCC et al.* are concerned that the Commission has failed to seek comment on certain key issues and that it lacks the data needed to assess the implications of its proposal.

Thus, *UCC et al.* ask that the Commission gather and analyze data from Form 355 on how television stations are currently serving communities so that it can properly weigh the loss of broadcast service against the benefits from repurposing. The Commission should also gather

¹ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, 25 FCC Rcd 16498 (2010) (“Notice”).

² *Id.* at ¶ 1-2.

the data needed to assess the impact of repurposing on broadcast station ownership by minorities and women. Additionally, to prevent a diminution in competition and diversity, the Commission should clarify the extent to which broadcasters sharing spectrum may collaborate in other areas without violating ownership limits and should eliminate the UHF discount.

I. The Commission Needs Additional Information to Assess the Impact Repurposing Spectrum Will Have on the Public Interest

In the Notice, the Commission “recognize[s] that broadcast television provides an important service to the public,” and that the Commission “remain[s] committed to preserving the free, over-the-air broadcast television service and maintaining the diversity of local voices and important informational and entertainment benefits it provides the American public.”³ However, repurposing broadcast spectrum for other uses will necessarily diminish the amount of broadcast television programming available to the public. Thus, to weigh the loss of that service against the benefits of making more spectrum available for wireless use, the Commission needs to be able to assess the extent to which broadcasters are currently serving the public interest.

Under the Communications Act, television broadcasters have a fundamental public interest obligation “to provide programming that responds to issues of concern to [their] community [of license].”⁴ Since the mid-1980s, the Commission required licensees to make quarterly issues/programs lists and to place these lists in their public file as a way for the public to verify whether licenses are serving their communities. However, in 2008, the Commission concluded that the issues/programs lists were not meeting their intended purpose and replaced the issues/program lists with a standardized form. This Form 355 is intended “to provide the

³ *Id.* at ¶ 13.

⁴ *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076, ¶¶ 3, 37 (1984) *recon. denied* 104 FCC 2d 358 (1986), *aff’d in part and remanded in part sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

public with easily accessible information in a standardized format on each television station's efforts to serve its community."⁵ The Commission's new rules also require that licensees make the standardized forms available on their websites. However, these rules have never taken effect because the Commission never sought clearance from the Office of Management and Budget.

The lack of information about how television broadcasters are serving their communities makes it extremely difficult to quantify how the Commission's spectrum repurposing plan would affect the Commission's goals of ensuring diversity, competition and localism. Thus, for example, if a television broadcaster that currently provides a substantial amount of local news and other local programming decides to return the spectrum in exchange for a cash incentive, it could have a very detrimental effect on the community. The effect would extend well beyond viewers that receive over-the-air television because local television stations are the ones that generally gather and produce local news programming that is also viewed on cable and satellite.

On the other hand, if a television licensee that provides little or no local news or issue-responsive programming gives up its spectrum in exchange for cash, the public would not lose as much in terms of program service. However, the broadcaster could be unjustly enriched at the expense of the public. The airwaves belong to the public, and broadcasters are granted licenses for free (in most cases) in exchange for serving the public interest. Licensees that have not upheld their end of the bargain should not receive an economic windfall. Thus, before making any decisions about repurposing the spectrum, the Commission must gather and analyze the Form 355 data.

⁵ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report*, Report and Order, 23 FCC Rcd 1274, ¶ 34 (2007) (petitions for reconsideration pending and *appeal pending sub nom.* Nat'l Ass'n of Broad. v. FCC, No. 08-1135 (D.C. Cir. filed March 27, 2008)).

II. The Commission Should Make Sure that Its Proposal Will Not Have a Negative Impact on Stations Controlled by Minorities and Women and Should Not Foreclose Opportunities for New Entrants

The Commission “propose[s] to limit channel sharing to television stations with existing applications, construction permits or licenses as of the date of adoption of [the] Notice.”⁶ In so doing, the Commission exacerbates a long-standing problem – the lack of station ownership by minorities and women. Congress has mandated that the Commission review and eliminate barriers to entry for underrepresented groups and “promot[e] economic opportunity and competition . . . [and] disseminat[e] licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women.”⁷

The Commission has recognized that “the overall level of minority and female ownership in the broadcast industry remains dismal.”⁸ The most recent analysis of television station ownership found that although women comprise 51% of the population, they only control 67 stations, or 4.97% of the total number of stations.⁹ Minorities comprise 33% of the population, but only control 44 stations, or 3.26% of the total number of stations.¹⁰ Broadcasters filed ownership data for 2009 in July 2010, but the Commission has not yet aggregated or analyzed it.¹¹ Nonetheless, there is no reason to believe that minority or female ownership has increased in recent years.

Repurposing and channel sharing could reduce opportunities for minorities and women – and the resulting diversity of viewpoints – in several ways. First, although the Notice is not

⁶ Notice at ¶ 22.

⁷ 47 U.S.C. § 309(j)(3)(B) (2007); 47 U.S.C. § 257 (2007).

⁸ *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, ¶ 1, nn. 1, 2 (2009).

⁹ S. Derek Turner & Mark Cooper, “Out Of The Picture: the Lack of Racial and Gender Diversity in TV Station Ownership,” attached as Study 11 to Comments of Consumers Union, et al., MB Docket 06-121 at 212 (October 23, 2006) (using data from 2005).

¹⁰ *Id.*

¹¹ See *Media Bureau Announces Availability of 2009 Biennial Ownership Data Set for Commercial Broadcast Licensees*, Public Notice, MB Docket No. 07-294 (Feb. 23, 2011).

explicit about this, a logical result of the proposal is that the Commission will not license any more television stations.¹² As a result, the opportunities for new entrants to obtain licenses through auctions could be eliminated.

Second, the proposal is premised on the conclusion that channel sharing is technically feasible. Assuming this is the case, it is troubling that the Commission proposes to limit channel sharing to existing television licensees. Limiting channel sharing to incumbents would at best maintain the existing low levels of ownership by minorities and women and could reduce minority and female ownership.

Instead, the Commission could allow new entrants to enter into channel sharing agreements with incumbent broadcasts. Indeed, such a proposal, known as the S-Class television license, was made by the FCC's Advisory Committee on Diversity for Communications in the Digital Age in 2008.¹³ The Commission should not take action in this proceeding that would foreclose the adoption of the S-Class proposal without giving careful consideration to that proposal. Repurposing spectrum or allowing channel sharing without creating chances for new entrants would undermine both Congress' and the Commission's objectives of promoting diversity.

The only reference to minorities and women in the Notice suggests that channel sharing could provide "opportunities for broadcasters serving minority, foreign language and niche interests . . . to operate at reduced cost and thereby improve their viability."¹⁴ Given the low

¹² See David Oxenford, "While Few Vie for New VHF TV Stations in NJ and Delaware, FCC Sets Comment Date on Improving VHF Digital Reception and TV Channel Sharing With Must Carry Rights As Ways to Help Clear TV Band for Broadband Users," *Broadcast Law Blog*, Feb. 6, 2011, available at <http://t.co/UHQhhW4>.

¹³ *Recommendation of FCC's Advisory Committee on Diversity for Communications in the Digital Age: Recommendation on S-Class Television Licenses*, (May 28, 2008) available at <http://www.fcc.gov/DiversityFAC/adopted-recommendations/s-class-licenses-102808.pdf>.

¹⁴ Notice at ¶ 15.

number of licenses held by minorities and women, it seems unlikely that that spectrum sharing would improve their viability. Moreover, since stations owned by minorities and/or women typically operate with less capital and advertising dollars, they would have unequal bargaining power in sharing arrangements. Thus, rather than improve their viability, sharing could reduce their ability to attract audiences. At the very least, the Commission should not assume that minority or female broadcasters would benefit from sharing without some evidence.

Finally, one might argue that while minorities and women may have fewer opportunities to be broadcasters, they will have greater opportunities to obtain wireless spectrum. However, this scenario seems unlikely and should not be assumed in the absence of any evidence. The spectrum to be made available for wireless broadband will be auctioned. Under the current auction rules, the Commission awards bidding credits to “designated entities,” i.e., “small businesses” as defined by the SBA.¹⁵ This credit was adopted with the understanding that it would give minorities and women additional opportunities to participate in the auction process.¹⁶ Yet, the FCC has never systematically examined whether the bidding credits have been effective for this purpose.

Available evidence suggests that bidding credits have not been effective in increasing participation by minorities and women. As measured by net value of licenses won, the participation by designated entities in wireless auctions plummeted from an average of more than 70% in six major commercial mobile radio service auctions from 1996 to 2005, to 4.0% in Auction 66, the first auction after the adoption of new designated entity rules.¹⁷ In the next

¹⁵ See 47 C.F.R. § 1.2110(a).

¹⁶ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136, 140, ¶ 5 (1995).

¹⁷ See Brief for Antares Holding, LLC et al. as Amici Curiae Supporting Petitioners, *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010) (No. 08-2036), at 5 (citation omitted).

major wireless auction, Auction 73, only 2.6% of participants were designated entities.¹⁸

Moreover, “women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses.”¹⁹ Thus, before auctioning additional spectrum for wireless broadband, the Commission should make sure that minorities and women and other new entrants are able to participate.

III. The Commission Should Clarify Limits on Sharing Arrangements to Prevent Losses in Diversity, Competition, and Localism

The Notice anticipates that when stations enter into spectrum sharing arrangements that each station will “be separately subject to all of the Commission’s obligations.”²⁰ Moreover, the Commission does “not envision that channel sharing . . . would entail a fixed split into two three-megahertz blocks. Rather . . . [the Commission] would leave it up to the licensees to determine the precise manner in which that capacity would be shared.”²¹ Thus, channel sharing would require joint decision-making on the quality, timing, and content of broadcast programming. Stations that have been competing head-to-head would have to collaborate in order to share spectrum.

Such collaboration is likely to foster collaboration in other areas such as programming, production and advertising sales. Indeed, *UCC et al.* are concerned that even without sharing a frequency channel, many television stations in smaller markets are already involved in sharing arrangements. These arrangements may be called “shared services agreements,” “joint operating agreements,” “local marketing agreements,” or “joint sales agreements.”²²

¹⁸ *Id.*

¹⁹ Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction, FCC News Release (Mar. 20, 2008).

²⁰ Notice at ¶ 21.

²¹ *Id.* For example, it might not be possible for all of the stations sharing six megahertz to broadcast in high definition at the same time.

²² See Comments of Communications Workers of America and Media Council Hawai’i, GN Docket 10-25, 3-5 (filed May 7, 2010); see also Application for Voluntary Assignment of For KTVA-TV, Topeka,

Commenters are concerned that sharing arrangements may be used to evade the local television ownership limits. Even if they technically do not violate the ownership limits, they may reduce diversity and competition. For example, sharing arrangements often involve one television station producing the local news for one or more other stations in the market.²³ Thus, if the Commission allows channel sharing, it should provide clear guidance as to what other types of sharing is permitted in order to promote diversity and competition. If multiple stations do share a single channel, the Commission must ensure that each station's rights and autonomy are clearly defined.

IV. The Commission Should Eliminate the UHF Discount

The Notice asks what impact channel sharing will have on its media ownership rules.²⁴ The Notice also proposes to examine ways to increase the utility of VHF spectrum for broadcasting to encourage television stations to use VHF spectrum and make UHF spectrum available for other uses.²⁵ Thus, channel sharing and encouraging stations to shift from UHF to/from VHF will have an impact on the national television ownership rule, also known as the "audience reach limitation," which has been set by Congress at 39%.

The problem arises because the Commission has inexplicably failed to eliminate the "UHF discount." The UHF discount has long outlived its usefulness. Before the digital transition, UHF stations had weaker signals and reached smaller audiences than VHF stations. When the Commission decided to limit station ownership based on potential audience reach rather than number of stations, it attributed UHF stations with only 50% of the audience reached

KS from Free State Communications, LLC to PBC Broadcasting of Topeka, LLC, *Petition to Deny of American Cable Association*, Dkt. No. BALCDT-20110208ADB (filed Mar. 16, 2011).

²³ See, e.g., Comments of Free Press, MB Docket 09-182, 9-11 (filed July 12, 2010); Hilary Atkin, "As Local Sharing Progresses, New Concerns Emerge," TVWeek, Aug. 3, 2009, available at http://www.tvweek.com/news/2009/08/as_local_sharing_progresses_ne.php.

²⁴ Notice at ¶ 29.

²⁵ *Id.* at ¶ 42.

by VHF stations.²⁶ However, in the 2002 Biennial Review of Broadcast Ownership Rules, the Commission found that the digital transition would “largely eliminate the technical basis for the UHF discount [by] substantially equaliz[ing]” VHF and UHF.²⁷ Nonetheless, the FCC did not then, and still has not eliminated the discount.

As the Notice recognizes, digital broadcast signals on UHF are of better quality than those on VHF spectrum.²⁸ Since the digital transition, many station owners have—with the Commission’s consent—moved their formerly-VHF stations to UHF portions of the spectrum.²⁹ Such moves have had the perverse effect of allowing some broadcasters with a large audience reach to acquire even more stations in excess of the 39% limit, thereby reducing diversity and competition.³⁰

If the FCC does not eliminate the UHF discount, it will inevitably lead to gamesmanship among broadcasters VHF owners when deciding whether to channel share, because UHF gives them a distinct advantage under the current national ownership limit. Even if the Commission is

²⁶ *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC.2d 74, ¶ 43 (1985); See generally Cecilia Rothenberger, Comment, *The UHF Discount: Shortchanging the Public Interest*, 53 AM. U. L. REV. 689, 698–701 (2004).

²⁷ *2002 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13847 ¶ 591 (2003).

²⁸ Notice at ¶¶ 42-45.

²⁹ For example, NBC relocated eight VHF stations to UHF between April 2008 and February 2010, and during this same time period, also acquired two additional UHF stations. As a result, twenty-six of NBC’s twenty-eight stations are now UHF, and its national audience reach is 36.63%. But if its national audience reach were calculated using the UHF Discount, it would “fall” to 19.39%. This would arguably allow NBC to buy even more stations. When Congress set the limit at 39%, it did not expect that the major networks and group owners would be able to expand even further. Nor is NBC the only major owner that has converted VHF stations to UHF. CBS relocated eleven stations between April 2008 and February 2010. While its twenty-eight owned and operated stations slightly exceed the 39% maximum, its audience reach, if calculated using the UHF discount, would only be 23.68%. Comments of the Office of Communication of the United Church of Christ *et al.*, MB Docket 09-182 (filed July 12, 2010).

³⁰ This result is inconsistent with Congress’ intent in passing the Consolidated Appropriations Act of 2004, which lowered the 45% audience reach limit to 39%. See Pub. L. No. 108-199, §629, 118 Stat. 3 (2004).

successful in improving the utility of VHF spectrum, broadcast stations currently operating on UHF spectrum will have a disincentive to switch to VHF. To avoid this problem and eliminate these negative incentives, the Commission should act promptly to eliminate the UHF discount.³¹

V. Conclusion

UCC et al. understand the FCC must be ambitious to meet the public's demand for wireless broadband, but the Commission must also be practical. Thus, *UCC et al.* request that the Commission collect necessary the data and evaluate the implications of repacking and sharing arrangements in order to preserve its core goals of diversity, competition and localism.

³¹ Nothing in the Consolidated Appropriations Act of 2004 changed the Commission's existing authority to modify or eliminate the UHF discount. Indeed, this issue was fully briefed in comments filed with the Commission in 2004, but the Commission never issued its opinion. *See Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap*, Public Notice, 19 FCC Rcd 2599 (Feb. 19, 2004). The plain language of the Appropriations Act did not refer to the UHF discount or to the method of calculating the national audience reach limitation. The inclusion of statutory language that merely referred to Commission rules did not limit Commission authority to review or change those rules. At most, the language in Section 629(3) of the Appropriations Act might be found ambiguous, in which case the Commission will be afforded a great deal of deference in interpreting the statute. *UCC et al.* believe that the only reasonable interpretation is that the Commission's authority to modify or eliminate the UHF discount continues. Stripping the agency of that authority would be illogical and at direct odds with the purpose of the Appropriations Act, the 1996 Telecommunications Act, and Supreme Court standards of statutory interpretation. Reply Comments of the Office of Communication of the United Church of Christ *et al.*, MB Docket No. 02-277 (filed Mar. 29, 2004); Comments of the Office of Communication of the United Church of Christ *et al.*, MB Docket No. 02-277 (filed Mar. 19, 2004).

Respectfully Submitted,

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